United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

9-16-76

ORIGINAL

76-7346

To be argued by
GEORGE F. CHANDLER III

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADAX LIMITED; NITROVIT LIMITED; JOSEPH RANK LTD.; REASON & BUSBY LTD.; T. D. BAILEY LTD.; HUDSON WARD & CO. LTD.; BARKER, LEE, SMITH LTD.; WHITTENS LTD.; GENERAL FREIGHT CO. LTD., and BOCM SILCOCK LTD.,

Plaintiffs-Appellants,

against

M.V. "HOLENDRECHT", her engines, boilers, tackle, etc.,

and against

N. V. STOOMVAART MAATSCHAPPIJ DE MAAS and PHS. VAN OMMEREN, N. V.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

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IN THE

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Issues Presented for Review

1. May a shipowner, not a party to the sub-charter, but a party to the head charter compel a holder of a bill of lading, not a party to either charter, to arbitrate under the arbitration clause in the sub-charter referenced in the bill of lading issued in accordance with the sub-charter?

2. May a vessel manager/operator, not a party to either charter, compel a holder of a bill of lading, also not a party to either charter to arbitrate on the same basis?

3. May arbitration be demanded under an arbitration clause which has expired under an automatic provision?

Statement

This is a case in Admiralty and Maritime Law involving damage to plaintiffs-appellants' cargo of corn. Plaintiffs-appellants brought suit in the Southern District of New York against the vessel, its listed owners (N.V. Stoomvaart Maatschappij de Maas), and the operators of the vessel and controlling company of the listed owners (Phs. Van Ommeren, N. V.), neither of whom were parties to the charter-party. The defendants-appellees answered and appeared in the matter. Within the answers they demanded arbitration under the bills of lading. Before any further proceedings were had, defendants-appellees brought on a motion to stay the action pending arbitration. The motion was submitted to the District Court, Honorable Kevin T. Duffy, on June 22, 1976, without oral argument, and Judge Duffy rendered his order that same day, stating:

> "Memo Endorsed on Motion, Duffy, J.
>
> Motion to stay this cause pending arbitration is granted. The bills of lading specifically incorporated the arbitration provisions of the charter. The argument that the arbitration may be time-barred is to be resolved by the arbitrators.
>
> The matter is to be transferred to the Suspense Docket.
>
> It is so ordered." (Appendix Page A 20)

No facts or law were stated in the order, nor was counsel ever apprised by any other medium of the factual or

legal basis of the order. Notwithstanding this vacuum, it was decided to appeal the order, since it seemed contrary to the law of this Circuit, and inequitable in that plaintiffs-appellants could not have demanded arbitration of the defendants-appellees.

Facts

The plaintiffs[1] purchased a quantity of corn by becoming holders for value of negotiable bills of lading (pp. A14-A17). The bills of lading were entitled "Baltimore Form C. Berth Term Grain Bill of Lading" commonly used in connection with a similarly titled charter party form. Each bill of lading stated:

> "ALL TERMS, CONDITIONS AND EXCEPTIONS AS PER CHARTER PARTY DATED LONDON DECEMBER 18th, 1972 TO BE CONSIDERED AS FULLY INCORPORATED HEREIN."

and

> "10. All terms, conditions and provisions of the Strike, Lighterage Clause No. 26 and the Arbitration Clause of the 'centrocon' charter-party to apply."

The Charter-Party dated London December 18th, 1972 incorporated in the bills of lading by reference was a "Form C. Adopted 1913. Approved Baltimore Berth Grain Charter Party Steamer" (pages A18-A19). The parties thereto were Henry W. Peabody Grain Limited as disponent owners and S. T. M. Grain Limited as charterers. The arbitration clause incorporated in this charter-party and in the "charter-party" bills of lading, according to the addendum to the charter-party states:

"CENTROCON" ARBITRATION CLAUSE

> All disputes from time to time arising out of this contract, shall, unless the parties agree forthwith on a

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[1] Plaintiffs jointly owned the goods and General Freight Co. Ltd. represented all interests.

> single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be Members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his acting be taken before the award is made."

It is not known how Henry W. Peabody Grain Limited became disponent owner, however, within its answer defendants alleged that:

> "* * * during the time of the voyage in question, the vessel was on charter *to* Henry W. Peabody Grain Ltd., under a charter party dated December *14*, 1972 * * *" (page A8, paragraph 3). (emphasis added)

Thus it appears that, four days prior to making a charter with S. T. M. Grain Ltd., Henry W. Peabody Grain Limited chartered the vessel either from the listed owner N. V. Stoomvaart Maatschappij de Maas or from some other disponent owner pursuant to a charter-party dated December 14, 1972 (making this the "head-charter"), and Henry W. Peabody Grain Limited in turn made another charter dated London, December 18th, 1972 (this being a "sub-charter"). Nothing is known of the head-charter other than that slight amount of information provided within defendants' answer.

The plaintiffs were not party to either the head-charter or sub-charter, and were only aware of the sub-charter and its attending arbitration clause through its reference on the bills of lading.

The corn[2] was loaded in bulk on board the M.V. "HOLENDRECHT" on February 6, 1973 in Philadelphia by the Tidewater Grain Company, the shipper. Bills of lading in question were issued that same date by Lavino Shipping Company "As agents for the Master" (pages A14-A17) listing Henry W. Peabody Grain Limited as a notify party.

Shortly thereafter, the vessel left Philadelphia in the face of severe storm warnings in the Atlantic Ocean, improperly trimmed and overdraft for the ocean zone and season. Almost immediately upon entering the Atlantic Ocean from the security of the Delaware River, the no. 1 hatch cover failed, admitting sea water and damaging part of the corn. The vessel pulled into New York for repairs. Part of the corn was removed and disposed of, while the hatch cover was temporarily repaired. The ship proceeded to Hull, England arriving March 1, 1973 where it discharged on March 2, 1973 the remainder of the corn, some of which was damaged by contact with sea water.

Plaintiffs, through General Freight Co. Ltd., filed a written claim also on March 2, 1973 for loss and damage with defendants' representatives. Thereafter settlement was explored, while plaintiffs received extensions of time. No demand for arbitration under either charter-party is known to have been made.

Summary

Owners and operators seek to demand arbitration under a charter-party to which they were not a party. Had the bills of lading referenced the December *14*, 1972 head-charter rather than the sub-charter of December *18th*, 1972 actually referenced, then concededly the stay pending arbitration would be proper at least for the owners (assuming,

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[2] A cargo of soybeans was also aboard the vessel, but not a part of this suit.

for the moment that the owners have such rights under the December 14, 1972 head-charter).

If owners were determined to have their arbitration they should have demanded arbitration under a head-charter praying in turn that the charterer demands arbitration under the sub-charter, than obtaining consolidation of the arbitrations, as is customarily done (there is a risk that no arbitration would be demanded under the sub-charter, but plaintiffs would face the same risk starting out under the sub-charter. It may also be that there is no arbitration provision in the head-charter which would force defendants to bring suit.).

In any event, the managers/operators in the suit have no standing under any theory to compel arbitration, in as much as they are not party to any contract but are merely being sued under the general provision of Maritime Law.

Finally, the arbitration clause invoked terminates automatically three months after discharge of the goods and absolutely bars any claim under it, without provisions for extensions. It was the intent of the parties to proceed within a suit if settlement of the matter could not be reached. In such an arbitration, the clause allows no discretion to the arbitors to find other than that any claim is barred at this date, thus thwarting plaintiffs' valid claim.

POINT I

The defendants were not parties to any charter incorporated in the bills of lading, thus neither plaintiffs nor defendants can demand arbitration of each other for any dispute.

Plaintiffs concede that the bills of lading fully incorporate the arbitration provision of the sub-charter of December 18th, 1972, and that had the owners been part of that sub-charter, then arbitration would be the proper forum for the plaintiffs and the owners.

It was declared in *Lowry & Co.* v. *S.S. Le Moyne D'Iberville,* 253 F. Supp. 396 that:

> "• • • an agreement to arbitrate all 'disputes • • • arising out of this charter' binds not only the original parties, but also all those who *subsequently* consent to be bound by its terms. *Son Shipping Co.* v. *De Fosse & Tanghe,* 199 F.(2d) 689 (2 Cir., 1952); *Lowry & Co.* v. *S.S. Nadir,* 223 F. Supp. 871, 873-874 (S.D.N.Y., 1963). The centrocon clause, with its provision that 'all disputes • • • arising out of this contract shall • • • be referred to' arbitration, is broad enough to bind libellant as well as the original parties to the charter party, provided it was effectively incorporated in the bills of lading held by the libellant. See *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.,* 351 F.(2d) 503, 506 (2 Cir., 1965); *Son Shipping Co.* v. *De Fosse & Tanghe,* supra; *Lowry & Co.* v. *S.S. Nadir,* supra; *Cia. Naviera Somelga, S. A.* v. *M. Golodetz & Co.,* 189 F. Supp. 90, 96 (D. Md., 1960)." (Emphasis added).

The key words in the above citations are "original parties" and "those who *subsequently* consent to be bound by its terms". Defendants are not original parties nor did they subsequently consent to be bound by the terms of the sub-charter, since their involvement, if any, was prior to the making of the sub-charter.

Defendants attempt to get around this defect by claiming arbitration under the bills of lading only (printed clause 10 of the bills of lading), hoping to ignore the charter-party of December 18th, 1972 (sub-charter). Since these are "charter-party" bills of lading, specifically drawn to suit the form of the charter-party, and since the charter-party is referenced explicitly in the bills of lading, the sub-charter cannot be ignored if arbitration is demanded.

This Court had previously prevented holders of a bill of lading incorporating a sub-charter with a similar arbitra-

tion clause, from requiring a vessel owner, who was not a party to the sub-charter, to arbitrate the dispute. This Court held in *Instituto Cubano de Est. del Azucar* v. *T/V Golden West,* 246 F.2d 802 at 804 that:

> "The district judge denied the motion to compel Skibs A/S Golden West to proceed with arbitration. He held that such a substitution was unwarranted; for, although the bills of lading issued by the owner's master may have made the owner liable to the shipper for any shortage in the shipment upon delivery, the owner was not a party to any Charter incorporated in the bills of lading that provided for submission of shortage claims to arbitration. We affirm.
>
> If the libellant desired to submit its claims of shortage to arbitration, it should have served its demand upon Transocean, with whom it had its arbitration agreement. The charter party incorporated into the contract for carriage evidenced by the bills of lading so provided and cannot be reasonably read to provide otherwise. We point out that the charter party incorporated into the contracts for carriage evidenced by the bills of lading issued to the shipper by the master of the Norita that were in suit in Son Shipping Co., Inc. v. DeFosse & Tanghe, 2 Cir., 1952, 199 F.2d 687, was a charter party the owner of the Norita had executed and by which the *owner* had expressly agreed that disputes with the owner was arbitrable. Our decision here is not inconsistent with the holding there."

It was acknowledged that while the owner was liable under the bill of lading it could not be liable under the charter-party:

> "From these facts it is obvious that the respondent corporation never agreed to arbitrate any dispute of any kind with this libelant. It is equally obvious that the master of the T/V Golden West accepted the

molasses, issued bills of lading therefor, and carried the cargo, all pursuant to the terms of a charter party between the libelant and Transocean Shipping & Trading Company, to which charter this respondent was not a party; but when the master signed the bills of lading the vessel owner became liable *in personam,* and the vessel liable *in rem,* in the event there should be any failure in the performance of the contract of carriage the bills of lading evidenced. Cf. *The Schooner Freeman* v. *Buckingham,* 1855, 18 How. 182, 59 U.S. 182, at page 190, 15 L.Ed. 341; *The Alert,* 2 Cir., 1895, 61 F. 113; *The Themis,* 2 Cir., 1921, 275 F. 254; *The Carriage of Goods By Sea Act,* 46 U.S.C.A. §§ 1300-1315, particularly § 1301 (a), § 1301 (b), § 1303 (2)." 246 F. 2d 802 at 803.

Very recently the converse of the *Instituto Cubano* case was brought before the Honorable Marvin E. Frankel of the Southern District of New York in *Amstar Corporation* v. *S.S. NAASHI and Vallorbe Shipping Co., S. A. and Vasalem Shipping Corp.,* 75 Civ. 4895. In Judge Frankel's Memorandum Opinion dated May 26, 1976[3] he found that:

"It is clear that plaintiff could not have forced the defendant to arbitrate the instant dispute on the basis of the arbitration clause in the sub-charter. Interpreting a clause in a sub-charter with essentially identical language to that at bar, the Second Circuit held that an owner could not be forced to arbitrate its liability under bills of lading which incorporated the arbitration provision of the sub-charter. See *Instituto Cubano De Establizacion Del Azucar* v. *T/V Golden West,* 246 F.2d 802 (2d Cir.), cert. denied, 355 U.S. 884 (1957). Thus, the ship and its owners are liable, subject to any defense they may have, for any breach

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[3] A full copy of this opinion is included at the end of this brief for the Court's convenience, as was done for the Court below.

> of the contracts of carriage evidenced by the bills of lading, but they cannot be forced to arbitrate that liability pursuant to an arbitration agreement to which they are not parties."

He then explored the merits of whether or not defendants could invoke arbitration where plaintiffs could not, declaring:

> "Although the parties do not cite, and the court has not found, a case squarely on point, it would seem under analogous cases that defendant cannot invoke the subcharter arbitration clause as a basis for a stay under 9 U.S.C. § 3. Thus, guarantors of a charter party containing an arbitration clause covering 'any and all differences and disputes of whatsoever nature arising out of this Charter' could not invoke the clause to support a motion for a stay under 9 U.S.C. § 3 because the guarantors were not parties to the charter. See *Nederlandse Erts-Tankersmaatschappij, N.V.* v. *Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964). Cf. *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.*, 351 F.2d 503 (2d Cir. 1965). There, as here, the arbitration clause, although arguably broad enough to cover the dispute, could not be invoked by someone not a party to the agreement."

Other cases that have limited arbitrations to the parties connected to the applicable charter-party are: *Tubos De Acero Mexico, S. A.* v. *Dynamic Shipping, Inc.*, 249 F. Supp. 583, 1966 AMC 1903 and 1967 AMC 383 (SDNY); *Saxis S. S. Co.* v. *Multifacs Int'l. Traders*, 375 F.2d 577, and 502 F.2d 674; *Tokyo Boeki (U.S.A.), Inc.* v. *S.S. Navarino*, 324 F. Supp. 361 (SDNY); and *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 523 F.2d 527.

The customary means to obtain arbitration with parties to charters other than your own, but within the same gen-

eral action, is to demand arbitration with those whom you are entitled to arbitrate, and then convince them to demand arbitration with the party that you ultimately hope to arbitrate against. Consideration then must be sought to tie both arbitrations together, perhaps eliminating the middle party. (See *Vigo S. S. Corp.* v. *Marship Corp.*, 1970 AMC 1377, 26 N.Y. (2d) 157, 309 N.Y.S. (2d) 165, cert. den. 400 U. S. 819; *Chilean Nitrate Sales* v. *Intermarine Corp.*, 1972 AMC 2460 (SDNY); *Lavino Shipping Co.* v. *Santa Cecilia Co., S. A.*, 1972 AMC 2454 (SDNY); *Showa Shipping Co., Ltd.* v. *A/B Bellis*, 1972 AMC 2458 (SDNY); *Insco Lines, Ltd.* v. *Cypromar Nav. Co., Ltd.*, 1975 AMC 2233 (SDNY); and *Compania Espanola De Petroleos, S. A.* v. *Nereus Shipping, S. A.*, 527 F.2d 966, wherein various consolidations of arbitrations were considered.)

Defendants have used an incorrect method to obtain arbitration against plaintiffs. Under the method chosen to arbitrate by defendants, the arbitrators would have no charter-party terms to apply that concerns both parties. The sole function of the arbitration panel as constituted by defendants would be to determine the matter, applying the U. S. Carriage of Goods by Sea Act, 46 U. S. C. § 1300, as the United States District Court would have to do, since there would be no charter-party terms to consider. Only in context of dual or consolidated arbitrations could the arbitrators act as they should in interpreting charter-party terms.

Certainly it is inequitable to allow owners to have this method of arbitration available, when bill of lading holders under a sub-charter have no such rights.

POINT II

The vessel's managing agent or operator not a party to any contract of carriage cannot demand arbitration of any party.

The District Court made no distinction between defendants, and stayed arbitration for both. The answer to the complaint admitted "* * * that they owned and operated the M. V. HOLENDRECHT * * *" (page A8, paragraph 3) blurring the distinction between the parties. Defendant N. V. STOOMVAART MAATSCHAPPIJ DE MAAS is the listed owner, while PHS. VAN OMMEREN, N. V. manages the vessel for the listed owner (and most probably owns and controls the listed owner). So far as known PHS. VAN OMMEREN, N. V. is not a party to any bill of lading or charter-party in any capacity. Although not a direct party to the bill of lading or sub-charter, the listed owner is liable *in rem* under the bill of lading (*Instituto Cubano de Est. del Azucar* v. *T/V Golden West,* supra at 803). The managing agent is liable to plaintiffs in negligence, not under contract. As was stated in *Cerro Sales Corp.* v. *Atlantic Marine Enterprises, Inc.,* 403 F. Supp. 562 (SDNY) at page 568:

> "It is clear that an agent is not covered by the limitations of COGSA available to a carrier, and that an agent may be fully liable for its acts of negligence. *Robert C. Herd & Co., Inc.* v. *Krawill Machinery Corporation,* 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959). All of the cases cited by defendants in an attempt to prove Maritime an improper party are not on point. Those cases deal with liability of agents under agreements for carriage. The complaint here alleges breach of the agreements only against Atlantic. It charges both defendants, however, with negligence. The court finds that Maritime, in its failure to provide a proper crew for the North America, and its failure

> to properly counsel in fire protection once it had assumed this managerial function, was negligent, and that its negligence proximately caused the loss and damage to Cerro's cargo. Accordingly, both defendants are jointly and severally liable."

Even if the shipowner had been a party to the referenced charter-party, the managing agent would not be able to demand arbitration or be compelled to arbitrate under such a charter-party.

There is just no basis for PHS. VAN OMMEREN, N. V. to be part of any arbitration.

POINT III

The arbitration clause expired automatically and absolutely three months after discharge thus no party can now demand arbitration under the clause.

Usually it is left to the discretion of the arbitrators whether or not arbitration is timely. In this clause, there is nothing left to the arbitrators' discretion since the word "absolute" is included in the clause.

No doubt the shipowners' inability to compel arbitration under the head-charter which prevented dual arbitrations from being commenced, is due to a similar expiration of the arbitration clause, if any, of the head-charter. In any event, Henry W. Peabody Grain Limited, the common party to both charters cannot now compel arbitration under the sub-charter. As was held in *Sucrest Corp.* v. *Chimo Shipping,* 236 F. Supp. 229 (SDNY):

> "It appears from the libellant's brief that the owner received timely notification of the damage, and it is undisputed that neither side made any move toward arbitration within the prescribed period. The narrow question is whether the respondent, by its failure to

take the affirmative steps required of it by the charter-party, thereby waived its right to arbitration and is estopped from asserting the limitation of the arbitration provision as an affirmative defense.

The duty of the charterer and the owner to act within six months of discharge was concurrent. After the dispute arose, however, neither party appointed an arbitrator or, so far as appears, so much as indicated any intention or desire to arbitrate. Both sides proceeded in complete disregard of the arbitration provision."

* * * *

"The respondent's failure to make any attempt to arbitrate, after it had notice that a dispute had arisen, and despite its knowledge of its obligation under the charter-party to appoint an arbitrator and commence arbitration within six months, can only be construed as conduct inconsistent with an intention to arbitrate. It was 'an intentional relinquishment or abandonment of a known right'. *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938)."

Extensions of time were given to plaintiffs by defendants' representatives. No provision within the arbitration clause allows for extensions of time beyond the three months provided, thus the extensions could only be for suit to be commenced. If arbitration is compelled it will be a sham since the arbitrators can do no more than find that the arbitration clause has expired and that no claim may be brought under it. This would thwart the intent of the parties to extend plaintiffs' time pending arbitration, an unfair result, since claim has been diligently prosecuted.

Thus the arbitrators' sole function would be to find that arbitration is barred. On that basis this Court should decide the issue at hand rather than the arbitrators.

Conclusion

It is submitted that the District Court was in error in holding that this matter may be stayed pending arbitration, and holding that the arbitrators are to resolve the issue of whether or not the arbitration is time barred.

Respectfully submitted,

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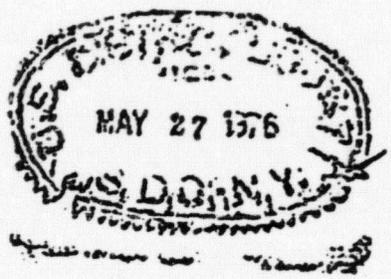
ADDENDUM



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMSTAR CORPORATION, Plaintiff, -against- S.S. NAASHI, her engines, boilers, etc., In Rem, -and- VALLORBE SHIPPING CO., S.A. and VASALEM SHIPPING CORP., Defendants.	:	75 Civ. 4895 MEMORANDUM 4/9/88

FRANKEL, D.J.

Plaintiff Amstar Corporation, the owner and holder of certain bills of lading for a cargo of sugar shipped from Peru to Philadelphia on the S.S. NAASHI, is suing that vessel and her owner and charterer for damages sustained as a result of the contamination of the sugar by seawater and oil. The defendant owner, Vasalem Shipping Corp., has moved for a stay of the suit pursuant to 9 U.S.C. § 3. For the reasons stated below, the motion is denied.

I.

At the time of the voyage, in the fall of 1974, the S.S. NAASHI had been sub-chartered to Farr Man & Co., Inc., by Vallorbe Shipping Co., S.A.,[1] which had chartered the ship

1. Vallorbe Shipping Co., S.A., is named as defendant in this action but appears not to have been served; it has not, in any event, joined in the motion for arbitration.

from the defendant pursuant to a time-charter dated March 13, 1974. Defendant predicates its claim for a stay on an arbitration clause contained in a sub-charter between Farr Man & Co., Inc. and Vallorbe Shipping Co., Inc., dated September 6, 1974.

The arbitration clause invoked provides that "[a]ny and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of New York unless the parties hereto otherwise agree. . . . Either party hereto may call for such arbitration by service upon the other. . . ." The bills of lading issued to plaintiff by the Master of the S.S. NAASHI were explicitly made subject "to all the terms, provisions, and conditions" of the charter between Farr Man & Co., Inc., and Vallorbe Shipping Co., Inc.[2]

Defendant's theory for a stay is that the bills of lading incorporated the arbitration clause quoted above, that the clause covered all disputes arising out of the shipment made pursuant to the charter, and, therefore, that plaintiff is bound to arbitrate its dispute with defendant for breach of the bills of lading.[3] Plaintiff's counterthesis

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2. The exact language is as follows:
"Subject to all the terms, provisions, and conditions of BULK SUGAR CHARTER PARTY--U.S.A. (April, 1962) dated at NEW YORK, 6th September 1, [sic] 974."

3. The suit is based upon the alleged unseaworthiness of the vessel.

is that defendant cannot invoke an arbitration clause in a charter to which neither contestant here is a party and, moreover, that the language of the clause itself does not extend beyond disputes between the parties to that charter.

II.

It is settled in this Circuit that arbitration clauses in charter parties are to be interpreted like other contract provisions. See Son Shipping Co. v. De Fosse & Tanghe, 199 F.2d 687, 689 (2d Cir. 1952). A reference in a bill of lading to a charter, if sufficiently described, incorporates the charter. See, e.g., Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F. Supp. 396, 398 (S.D.N.Y. 1966). Where, as here, the reference, in all-encompassing language, is to a specifically identified charter, the arbitration clause contained therein is clearly incorporated. Id. at 398. That the clause is incorporated in the bill of lading, however, does not answer the questions of (1) whether defendant may invoke the provision or (2) its proper interpretation.

It is clear that plaintiff could not have forced the defendant to arbitrate the instant dispute on the basis of the arbitration clause in the sub-charter. Interpreting a clause in a sub-charter with essentially identical language

to that at bar,[4] the Second Circuit held that an owner could not be forced to arbitrate its liability under bills of lading which incorporated the arbitration provision of the sub-charter. See Instituto Cubano De Estabilizacion Del Azucar v. T/V Golden West, 246 F.2d 802 (2d Cir.), cert. denied, 355 U.S. 884 (1957). Thus, the ship and its owners are liable, subject to any defense they may have, for any breach of the contracts of carriage evidenced by the bills of lading, but they cannot be forced to arbitrate that liability pursuant to an arbitration agreement to which they are not parties. See id. at 803-04. The only remaining question is whether a different rule obtains when the owner affirmatively seeks to invoke an arbitration agreement to which it is not a party.

Although the parties do not cite,[5] and the court has not found, a case squarely on point, it would seem under analogous cases that defendant cannot invoke the sub-charter's

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4. The exact language is as follows:

> "Any and all differences and disputes of whatsoever nature arising out of this Charter. . . . Either party hereto may call for such arbitration by service upon any officer of the other. . . ." 246 F.2d at 803.

5. The cases relied upon by defendant all involve charters to which the owner was a party. Thus, the only issue involved in those cases was the interpretation of the language of the arbitration clause to determine whether a third party would be bound thereby.

arbitration clause as a basis for a stay under 9 U.S.C. § 3. Thus, guarantors of a charter party containing an arbitration clause covering "any and all differences and disputes of whatsoever nature arising out of this Charter" could not invoke the clause to support a motion for a stay under 9 U.S.C. § 3 because the guarantors were not parties to the charter. See Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440 (2d Cir. 1964). Cf. Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F.2d 503 (2d Cir. 1965). There, as here, the arbitration clause, although arguably broad enough to cover the dispute, could not be invoked by someone not a party to the agreement.[6]

The defendant's motion for a stay is denied.

So ordered.

MARVIN E. FRANKEL

Dated, New York, New York
May 26, 1976

U.S.D.J.

6. Whether defendant might have standing, as a third party beneficiary, to compel arbitration if the clause referred to it by name, and thus evidenced a clear intent by the parties to the charter to have included the provision for defendant's benefit, is not at issue here. Moreover, defendant does not suggest that it is a third party beneficiary of the clause or cite any authority indicating whether such a beneficiary would have standing under 9 U.S.C. § 3 to seek a stay.

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 16TH day of SEPTEMBER 1976.

.....
Attorney for APPELLANTS

COPY RECEIVED

SEP 16 1976

KIRLIN, CAMPBELL & KEATING